

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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www.montgomerycountymd.gov/content/council/boa/index.asp

CASE NO. A-6443

PETITION OF CHRISTINA PEARSON AND ADAM HORVATH

OPINION OF THE BOARD

(Opinion Adopted October 29, 2014)

(Effective Date of Opinion: (November 21, 2014))

Case No. A-6443 is an application for a variance of two feet from the seven-foot side setback required by Section 59-C-1.323(b)(1) of the Zoning Ordinance. The Petitioners seek to locate HVAC equipment within five (5) feet of the side lot line.

The Board of Appeals held a hearing on the application on October 29, 2014. Christina Pearson and Adam Horvath appeared. Ed Scopin, their production coordinator and Frank Sis, their project manager also appeared.

Decision of the Board: Variance **denied**.

EVIDENCE PRESENTED

1. The subject property is Lot 27, Block 9, 0007 Subdivision, located at 5502 Center Street, Chevy Chase, Maryland, 20815, in the R-60 Zone.
2. Mr. Horvath testified that there is an existing HVAC unit already in the side yard, which does not efficiently heat and cool the house, so the request is replace it with two, newer units, one in the same location and one beside that. There is no record of a variance for the existing HVAC unit.
3. He testified that adding the HVAC unit is part of a larger renovation and that the Department of Permitting Services (DPS) initially reviewed and approved plans that included the location of the

HVAC unit, which he then proceeded to purchase. Mr. Horvath testified that the Village of Chevy Chase also reviewed the plans and determined that placement of the HVAC unit would require a variance, and that shortly after that DPS issued a stop work order for the mechanical permit to install the HVAC equipment.

4. Mr. Horvath stated that they chose the location for the HVAC units to "enhance our home" and "to ensure that we have a safe back yard for our children where we keep the exterior HVAC units." Mr. Horvath also stated that there is a pool that "takes up a fairly good portion of the overall back yard." [Transcript, October 29, 2014, p. 14].

He stated that in deciding where to place the HVAC units the Petitioners considered "safety" and "where we'd like to keep it out of the way." Mr. Horvath also stated that the units would be out of the line of sight from all of his neighbors. [Transcript, p. 15]. Mr. Horvath stated that they also considered financial expenses incurred in the course of their renovation. [Transcript, p. 16].

5. In response to a Board question, Mr. Horvath conceded that his lot is not significantly different in width from surrounding lots. [Transcript, pp. 18-19]. In response to a Board request for information about the unique characteristics of the lot, Mr. Scopin stated that a future phase of the renovation plans would "possibly [be] bumping out the back," so that if the HVAC units were located there, they would have to be moved, but none of the parties presented evidence of any other exceptional characteristic or peculiar situation on the property. [Transcript, p. 20]. In response to the Board's question as to why the HVAC equipment could not be located at the minimum five foot setback from the rear lot line, the Petitioners stated that it would be too close to the swimming pool. [Transcript, p. 23].

FINDINGS OF THE BOARD

A variance permits a use of a structure that otherwise would not be permitted by the zoning ordinance, which has led the Maryland Court of Special Appeals to clarify that "the authority to grant a variance should be exercised sparingly and only under exceptional circumstances," *Cromwell v. Ward*, 102 Md. App. 691, 703, 651 A.2d 424, 430 (1995) (citation omitted). Review of a variance application under an ordinance like Montgomery County's involves a two-step process to discern a unique characteristic of the property and then to determine whether a practical difficulty results from the uniqueness of the property:

The first step requires a finding that the property whereon structures are to be placed (or uses conducted) is -- in and of itself -- unique and unusual in a manner different from the nature of the surrounding properties such that the uniqueness and peculiarity of the subject property causes the zoning provision to impact disproportionately upon that property. Unless there is a finding that the property is unique, unusual, or different, the process stops here and the variance is denied without any consideration of practical difficulty or unreasonable hardship. If that first step results in a supportable finding of uniqueness or unusualness, then a second step is taken in the process, i.e. a determination of whether practical difficulty and/or unreasonable hardship, resulting from the disproportionate impact of the ordinance caused by the property's uniqueness, exists.

Cromwell, 102 Md. App. at 694-695, 651 A.2d at 426. That the variance might allow an improvement to property that is "suitable or desirable or could do no harm or would be convenient or profitable to its owner" does not provide a basis for granting a variance. *Cromwell*, 102 Md. App. at 707, 651 A.2d at 432. The need for the variance must arise from the application of the zoning ordinance to the unique or peculiar characteristics of the property. See *Cromwell*, 102 Md. App. at 717-718, 651 A.2d at 437. The zoning ordinance must impact upon the land in a unique manner that does not exist where a restriction applies "equally to all lots of similar size." *Cromwell*, 102 Md. App. at 720, 651 A.2d at 438.

In *Salisbury Board of Zoning Appeals v. Bounds*, 240 Md. 547, 554-55, 214 A.2d 810, 814 (1965), the Maryland Court of Appeals enunciated the concept of a self created hardship;

If the peculiar circumstances which render the property incapable of being used in accordance with the restrictions contained in the ordinance have been themselves caused by the property owner or his predecessor in title, the essential basis of the variance, i.e. that the hardship be caused solely through the manner of operation of the ordinance upon the particular property, is lacking. In such a case a variance will not be granted; the hardship, arising as a result of the act of the owner or his predecessor will be regarded as having been self-created, barring relief.

Section 59-G-3.1. of the Montgomery County Zoning Ordinance ("Authority -- Board of Appeals") provides that the Board of Appeals may grant petitions for variances as authorized in Section 59-A-4.11(b) upon proof by a preponderance of the evidence that:

- (a) By reason of exceptional narrowness, shallowness, shape, topographical conditions or other extraordinary situations or conditions peculiar to a specific parcel of property, the strict application of these regulations would result in peculiar or unusual practical difficulties to, or exceptional or undue hardship upon, the owner of such property;

It is under this subsection that the Board must employ the analysis from the Cromwell case, set forth above. The Board is sympathetic to the Petitioners' plight, having proceeded on the basis of approved plans and then received a stop work order. But the Board can only grant variances based on the standards in the Ordinance. There is no evidence that any unique feature of the lot limits where the HVAC equipment can be located. The Homeowners' common sense choices about the HVAC equipment in relation to their overall renovation, even their consideration of keeping the units out of sight of the neighbors, are bases which Cromwell categorized as factors which might be "suitable or desirable or [which] could do no harm or [which] would be convenient or profitable" to the Petitioners, *Cromwell*, 102 Md. App. At 707, 651 A.2d at 432, but which cannot be the basis for a variance. The Board considers the constraint posed by the presence of the swimming pool in the backyard to be a self-created hardship. Thus while the Board is sympathetic to the Petitioners' efforts to improve their property in a manner that makes logical and design sense, the request does not meet the threshold requirements of Section 59-G-3.1(a) and the variance must be denied. Because the application does not meet the requirements Section 59-G-3.1(a), the Board did not consider its conformance with subsections (b)-(d).

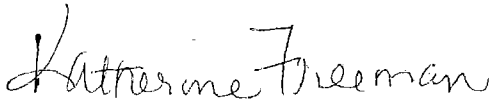
On a motion by John H. Pentecost, seconded by Carolyn J. Shawaker, with Stanley B. Boyd, Edwin S. Rosado and David K. Perdue, Chair, in agreement, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.



David K. Perdue
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
This 21st day of November, 2014.

A handwritten signature in cursive script that reads "Katherine Freeman". The signature is written in dark ink and is positioned above a horizontal line.

Katherine Freeman
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.